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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

TWITTER, INC.,

Plaintiff,

v.

WILLIAM P. BARR, Attorney  
General of the United States, *et al.*,

Defendants.

Case No. 14-cv-4480-YGR

**DEFENDANTS'  
OPPOSITION TO PLAINTIFF'S  
MOTION CHALLENGING  
DEFENDANTS' PRIVILEGE  
DESIGNATIONS**

Hon. Yvonne Gonzalez Rogers

## INTRODUCTION

Plaintiff has moved to compel a sample of twenty unclassified documents that Plaintiff contends have not been properly protected under the deliberative process, attorney-client, and work product privileges. Twitter's Mot. Challenging Defs.' Priv. Designations, (Pls.' Mot.) ECF No. 258. The majority of the documents Plaintiff moves to compel are internal emails between DOJ and FBI attorneys discussing the government's response to Twitter's request for the FBI to review Twitter's proposed draft Transparency Report, after Twitter had threatened publically to file a First Amendment suit. *See* Declaration of Cecilia O. Bessee, Acting Deputy General Counsel, Litigation Branch, Office of the General Counsel, Federal Bureau of Investigation, ¶ 4 (Feb. 28, 2019), *attached as* Ex. A.

As explained by Cecilia Bessee, the Acting General Counsel of the Litigation Branch in the FBI's Office of the General Counsel, the release of these documents would harm the ability of Government attorneys to discuss their views and engage in the kind of candid discussion necessary to provide critical legal and operational advice. *See* Decl. ¶ 7. They were prepared and maintained in confidence. *See id.* Each of these documents was prepared within the context of anticipated or pending litigation, given that Twitter had threatened to sue publicly as early as Feb. 6, 2014. *See id.* ¶ 4. (citing Posting of Jeremy Kessel to Twitter Blog, *Fighting for more #transparency*, [https://blog.twitter.com/official/en\\_us/a/2014/fighting-for-more-transparency.html](https://blog.twitter.com/official/en_us/a/2014/fighting-for-more-transparency.html), (Feb. 6, 2014); Julian Hattem, *Twitter threatens to sue Obama administration*, The Hill, Feb. 6, 2014, <https://thehill.com/policy/technology/197646-twitter-considers-legal-fight-to-disclose-docs>; *Twitter Threatens to Sue Obama Administration Over Gov't Surveillance Requests*, CBS Local Washington, DC, Feb. 6, 2014, <https://washington.cbslocal.com/2014/02/06/twitter-threatens-to-sue-obama-administration-over-govt-surveillance-requests>).

As such, the documents have been validly protected by the deliberative process privilege, the attorney client privilege, and under the work product doctrine.<sup>1</sup> Moreover, Twitter has not

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<sup>1</sup> Plaintiff notes in its Motion several inconsistencies and inaccuracies in the redactions within documents that do not pertain to Twitter's draft Transparency Report. *See* Pl.'s Mot. at 4. In their document production, Defendants produced more than 29,000 pages of documents to *Twitter, Inc. v. Barr, et al.*, Case No. 14-cv-4480-YGR  
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demonstrated any need that would override these privileges. For these reasons, this motion should be denied in full.

### **BACKGROUND**

Plaintiff in this action seek to disclose information in a draft Transparency Report regarding specific details of national security legal process Plaintiff received during 2013, beyond the disclosures permitted under the USA FREEDOM Act. *See generally* Case Mgmt. Statement, ECF. No. 244. On July 6, 2017, this Court denied Defendants’ motion for summary judgment, concluding that “the Government has not yet made a sufficient showing” that the draft Transparency Report cannot lawfully be published because it contains classified information, disclosure of which could reasonably be expected to cause harm to national security, and ordered discovery. Order Denying Government’s Mot. for Summ. J. Without Prejudice; Granting Twitter’s Mot. For Order Directing Defendants to Expedite Security Clearance (“July 6, 2017 Order”), ECF. No. 172 at 21. The parties agreed that discovery would proceed separately with respect to documents from the Government’s unclassified, SECRET and TOP SECRET systems. *See* Case Mgmt. Statement. at 10-12. Plaintiff now moves to compel the production of 20 unclassified so-called “Bellweather Documents” which Plaintiff selected from Defendants’ privilege logs—it challenges the assertion of the deliberative process privilege, attorney-client privilege, and work product privilege over those documents. *See generally* Pls.’ Mot.<sup>2</sup>

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Plaintiff within a very short time frame, and had multiple persons working on redactions at once. Although regrettable, it is inevitable that there would be occasional inconsistencies or errors within the redactions given judgment calls being made by different individuals with respect to particular documents. None of the examples Plaintiff points out give reason to believe that the government has asserted any privilege over-broadly or incorrectly, as Plaintiff contends.

<sup>2</sup> As to three of those twenty documents, Samples 18–20, Defendants have determined that those documents should be reprocessed and disclosed to the Plaintiff subject to the Protective Order governing these proceedings. Defendants are reprocessing those materials and will produce them to the Plaintiff as quickly as practicable.

## **ARGUMENT**

### **I. The Deliberative Process Privilege Has Been Validly Asserted With Respect to the Documents.**

The deliberative process privilege serves to encourage open and frank discussion by government agencies when formulating and discussing matters of policy. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001) (“The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance ‘the quality of agency decisions by protecting open and frank discussion among those who make them within the government.’” (quoting *NLRB v. Sears, Roebuck & Co*, 421 U.S. 132, 151 (1975)) (internal citation omitted)); *United States v. Nixon*, 418 U.S. 683, 705 (1974) (“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearance and for their own interests to the detriment of the decisionmaking process.”).

If such discussions were made public, “‘frank discussion of legal or policy matters’ in writing might be inhibited . . . [and] the decisions and policies formulated would be the poorer as a result.” *See Sears, Roebuck, & Co.*, 421 U.S. at 150 (internal quotations and citation omitted). The privilege thus protects “predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision,” *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975), and “allows the government to withhold documents and other materials that would reveal ‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (per curiam) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir. 1967)). The documents at issue in Plaintiff’s Motion present exactly the kinds of opinions, recommendations, and deliberations that the privilege is meant to protect. For this reason, this information should not be disclosed.

In order to fall within the scope of the deliberative process privilege, government information must be both pre-decisional and form part of “deliberative process.” *Maricopa Twitter, Inc. v. Barr, et al.*, Case No. 14-cv-4480-YGR

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1 *Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 (9th Cir. 1997) (citing *Sears, Roebuck &*  
 2 *Co.*, 421 U.S. at 151-52). “A ‘predecisional’ document is one ‘prepared in order to assist an  
 3 agency decisionmaker in arriving at his decision,’ and may include ‘recommendations, draft  
 4 documents, proposals, suggestions, and other subjective documents which reflect the personal  
 5 opinions of the writer rather than the policy of the agency.’” *Id.* at 1093 (quoting *Assembly of*  
 6 *State of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992)).

7 A pre-decisional document need not relate to a specific policy or decision—the Supreme  
 8 Court has made clear that the applicability of the common law deliberative process privilege  
 9 does not “turn[] on the ability of an agency to identify a specific decision in connection with  
 10 which a memorandum is prepared.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18. As the D.C.  
 11 Circuit has noted, “[a]ny requirement of a specific decision after the creation of the document  
 12 would defeat the purpose of the [privilege].” *Access Reports v. Dep’t of Justice*, 926 F.2d 1192,  
 13 1196 (D.C. Cir. 1991) (emphasis omitted). To establish information as “deliberative,” an agency  
 14 withholding material pursuant to that privilege in civil litigation “must establish what  
 15 deliberative process is involved.” *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998)  
 16 (quotation marks and citation omitted).

17 A predecisional document is part of the “deliberative process,” if “the disclosure of [the]  
 18 materials would expose an agency’s decisionmaking process in such a way as to discourage  
 19 candid discussion within the agency and thereby undermine the agency’s ability to perform its  
 20 functions.” *Maricopa*, 108 F.3d at 1093 (9th Cir. 1997). This inquiry focuses on “the effect of  
 21 the materials’ release”—namely, whether disclosure “would expose an agency’s decision-  
 22 making process in such a way as to discourage candid discussion within the agency and thereby  
 23 undermine the agency’s ability to perform its functions.” *Assembly of the State of Cal.*, 968 F.2d  
 24 at 921.

25 The deliberative process privilege may be asserted by the “head of the department” or  
 26 “supervisory personnel . . . of sufficient rank.” *Landry v. FDIC*, 204 F.3d 1125, 1135–36 (D.C.  
 27 Cir. 2000) (“it would be counterproductive to read ‘head of the department’ in the narrowest  
 28 possible way”). Here, Acting Deputy General Counsel Bessee has submitted a detailed

1 declaration describing exactly what kinds of deliberations are encompassed within the  
2 documents. *See* Bessee Decl., at 4-25 (describing deliberative information). The declaration  
3 describes, document by document, in as much painstaking care and detail as possible without  
4 revealing the privileged information itself, exactly what the deliberative information entails and  
5 why the information is deliberative. *See id.* Each of the documents that has been protected by  
6 the deliberative process privilege is information that was pre-decisional and a part of the  
7 deliberative process of the agency—its disclosure would be reasonably expected to chill candid  
8 discussion on such issues in the future. *Id.* ¶ 7. As Acting Deputy GC Bessee describes, the  
9 ability of government personnel to “openly discuss their views and engage in the candid give-  
10 and-take among each other and with their client . . . is essential to their ability to render high  
11 quality legal advice and representation, and, in turn, to facilitate the FBI’s lawful execution of its  
12 operational mission.” *Id.*

13 Plaintiff, citing to the Ninth Circuit in *Carter* and the D.C. Circuit in *Tax Analysts*, claims  
14 that the redacted information found within these documents can be protected by the deliberative  
15 process privilege only if the documents involve deliberations prior to the ODNI’s  
16 declassification of certain quanta of aggregate data regarding the government’s use of national  
17 security process, instead of deliberations regarding the application of that declassification to  
18 Twitter’s request for the FBI to review its proposed Transparency Report. *See* Pls.’ Mot. at 5-6  
19 (citing *Carter v. Dep’t of Commerce*, 307 F.3d 1084, 1089–90 (9th Cir. 2002); *Tax Analysts v.*  
20 *IRS*, 117 F. 3d 607, 617 (D.C. Cir. 1997)). But Plaintiff clearly misinterprets the holding of both  
21 cases. In *Carter*, the Ninth Circuit held that statistically adjusted census data from the sub-  
22 national level could not be protected as deliberative, because the data itself had not contributed to  
23 the agency’s decision-making regarding which kinds of data to release, but were instead  
24 “prepared solely for the purpose of post-decision dissemination.” *Carter*, 307 F.3d at 1089. The  
25 case thus stands for the perfectly logical conclusion that the *results* of an agency’s  
26 deliberations—in that case, adjusted census data—cannot be protected as deliberative, because  
27 they are not pre-decisional.

1 From one misinterpretation Plaintiff draws another. In *Tax Analysts*, the court  
 2 determined that the deliberative process privilege did not apply to Field Service Advice  
 3 Memoranda (“FSA”s), which were formal interpretive memoranda drafted by the Office of Chief  
 4 Counsel for the IRS in response to requests from IRS field analysts, revenue officers and appeals  
 5 agents. *See Tax Analysts*, 117 F.3d at 609. Each FSA contained “a statement of issues, a  
 6 conclusions section, a statement of facts, and a legal analysis section.” *Id.* The court found that  
 7 the FSAs could not be protected as deliberative because they were not pre-decisional: the FSAs  
 8 were “considered statements of the agency’s legal position” that constituted a “body of coherent,  
 9 consistent interpretations of the federal tax laws nationwide.” Wary of creating a “body of secret  
 10 law,” the court found that the agency could not protect the FSAs. *Id.* at 617.

11 Neither case holds, or even suggests, the legal conclusion Plaintiff proffers: that an  
 12 agency’s deliberations prior to *applying* a formal policy to a particular entity may not be  
 13 protected by the deliberative process privilege. *See* Pls.’ Mot. at 5-6. Indeed, such a conclusion  
 14 would fly in the face of the policy rationale underlying the privilege—if an agency’s  
 15 deliberations could only be protected when they create interpretive rules, but not when it  
 16 adjudicates those rules in particular instances, the privilege would cease to meaningfully protect  
 17 frank discussion wherever actual entities were to be affected by a policy. Instead, the cases stand  
 18 for a far less sensational idea—that an agency may not protect the final product of deliberations  
 19 as deliberative.

20 This situation is completely different. The deliberative material at issue did not concern  
 21 application of any agency policy or position, and certainly not a position that Plaintiff identifies  
 22 as, “the reporting framework set forth in the January 2014 ODNI letter (sic)” Pls.’ Mot. at 6.<sup>3</sup>  
 23 Moreover, the documents at issue in this motion are informal communications—email traffic—  
 24 that discuss the FBI’s response to Twitter’s request for the FBI to review Twitter’s proposed  
 25 Transparency Report. *See* Bessee Decl. at 4-25 (describing documents). Far from reflecting the  
 26 kind of formal, “considered statements of the agency’s legal position” at issue in *Tax Analysts*, or

27  
 28 <sup>3</sup> Indeed, the ODNI did not issue a “policy” or position in 2014; it made a discretionary  
 declassification of previously properly classified information. *See* Doc. 147-1, Ex. 1.

the data prepared for post-decision dissemination in *Carter*, these documents describe the initial opinions and candid views of attorneys and policy staff within DOJ and FBI prior to an agency decision. *See id.* ¶ 4. Such information is exactly the kind that, if released, “would expose an agency’s decision-making process in such a way as to discourage candid discussion within the agency.” *See Assembly of the State of Cal.*, 968 F.2d at 921. If these documents are not validly protected by the privilege, it is hard to imagine what would be.

**II. The Government’s Decision-making Process and Mental Impressions are not “At Issue,” so Plaintiff Does not Have a Need for Deliberative Information.**

Plaintiff claims that the qualified nature of the deliberative process privilege means that the privilege must yield to its purported need for deliberative information. *See* Pls.’ Mot. 7-9. Twitter contends that its suit amounts to a “direct[] challenge[] [to] a government agency’s deliberative process.” *See* Pls.’ Mot. at 7 (citing *Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1021 (N.D. Ill. 2016)). But Twitter’s challenge has nothing to do with Government deliberations: the only information that could be potentially relevant to whether the Government’s position survives strict scrutiny<sup>4</sup> is whether release of the information contained in the draft Transparency Report would present a national security harm sufficient to justify the restriction of Plaintiff’s speech. *See* July 6, 2017 Order, at 2 (assessing whether the Government had “demonstrate[d] that disclosure of the information in the Draft Transparency Report would present such a grave and serious threat of damage to national security as to meet the applicable strict scrutiny standard).

Plaintiff’s argument to the contrary is largely based on its reading of the *In re NSL* case, which it points out requires “individualized consideration of Twitter’s size, user base, or other unique attributes” in order for the government to survive strict scrutiny. *See* Pls.’ Mot at 1-2 (citing *In re Nat’l Sec. Letter*, 863 F.3d 1110, 1125 (9th Cir. 2017)). Plaintiff consequently argues that the “materials reflecting both the Government’s classification *process* and its reasons

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<sup>4</sup> Defendants preserve their position that strict scrutiny should not apply to this case, and maintain their view that discovery is not appropriate because the Government has demonstrated that the information Twitter wishes to reveal is properly classified, because its disclosure reasonably could be expected to result in serious damage to the national security. *See* Exec. Order 13526, § 1.1.

1 for restricting Twitter’s speech are ‘undoubtedly relevant,’” citing to the Western District of  
2 Washington in *Karnoski*. See Pls. Mot. at 8 (citing *Karnoski v. Trump*, No. C17-1297-MJP,  
3 2018 WL 1784464 (W.D. Wash Apr. 13, 2018) (appeal pending).

4 This contention is incorrect for a number of reasons. Most conspicuously, the Court’s  
5 discussion of the individualized analysis requirement in *In re NSL* did not concern an assessment  
6 of whether information is classified at all—instead it concerned the issuance of a nondisclosure  
7 requirement in connection with a particular National Security Letter under 18 U.S.C. § 2709(c).  
8 See *In re NSL*, 863 F.3d at 1110. Moreover, Plaintiff appears to believe that the individualized  
9 consideration contemplated by the *In re NSL* court must be demonstrated through internal email  
10 traffic—in fact, the unclassified Steinbach Declaration provides details about those  
11 individualized considerations with far greater concision and detail than these documents could.  
12 See Decl. of EAD Steinbach, ECF No. 147-1. As described in the Government’s Motion for  
13 Reconsideration addressing the effect of the *In re NSL* case on these proceedings, the Steinbach  
14 Declaration, “has articulated specific national security harms that could be reasonably be (sic)  
15 expected to result from the proposed disclosure, based on the specific conclusions that  
16 adversaries could draw from the disclosure that Plaintiff had, or had not, received certain process  
17 in a given year.” See Defs.’ Reply in Supp. of Mot. for Reconsideration, ECF No. 184 at 3  
18 (citing Steinbach Decl. ¶¶ 7–8, 30–38). Moreover, the articulation of this rationale in that  
19 declaration includes “individualized information as to why disclosure of the particular  
20 information at issue in Twitter’s report reasonably could be expected to harm national security—  
21 including based on Plaintiff’s particular situation and the size of its customer base.” See *id.* This  
22 information is readily available without the documents Plaintiff seeks.

23 Although Plaintiff would like to transform this case into one in which the state of mind of  
24 the decision-makers is at issue, this is *not* such a case—Plaintiff’s failure to recognize this fact  
25 renders its discussion of *Karnoski* inapposite. Attempting to analogize to that case, Plaintiff  
26 claims that the issue in that case “parallels the core issue here: ‘[w]hether Defendants have  
27 satisfied their burden of showing that the Ban is constitutionally adequate.’” See Pls.’ Mot. at 8.  
28 But that decision addressed a completely different question, *i.e.* the constitutionality of the

1 military’s policy regarding service by transgender individuals. *See Karnoski*, at \*13 (W.D.  
 2 Wash. Apr. 13, 2018). The court in that case found that the deliberative process privilege could  
 3 not protect the documents at issue there because a key question in the suit was whether the  
 4 motive for the classification was illegitimate “prejudice or stereotype . . . [which] necessarily  
 5 turns on facts related to Defendants’ deliberative process.” *See id.* But even assuming the  
 6 *Karnoski* district court was correct – an issue still on appeal<sup>5</sup> – no such questions of motive are at  
 7 issue here, and thus *Karnoski* is therefore inapposite.

8 In sum, Plaintiff has not placed the Government’s deliberations “at issue” in this case,  
 9 and therefore evidence Plaintiff seeks here is not relevant. What relevant information exists is  
 10 available elsewhere, *i.e.*, in the Unclassified Steinbach Declaration and in Defendants’ non-  
 11 privileged document productions to Plaintiff. Plaintiff has not shown that it has any need for this  
 12 information that overrides the deliberative process privilege.

### 13 **III. The Documents are Validly Protected by the Attorney-Client Privilege and the** 14 **Work Product Doctrine.**

15 “The attorney-client privilege protects confidential disclosures made by a client to an  
 16 attorney in order to obtain legal advice . . . as well as an attorney’s advice in response to such  
 17 disclosures.” *In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir. 1992). The purpose  
 18 of the attorney-client privilege is to “encourage full and frank communication between attorneys  
 19 and their clients and thereby promote broader public interests in the observance of law and  
 20 administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). “Clients  
 21 must be able to consult their lawyers candidly, and the lawyers in turn must be able to provide  
 22 candid legal advice.” *United States v. Christensen*, 828 F.3d 763, 802 (9th Cir. 2015). This  
 23 rationale applies with “special force in the government context” to encourage employees “to seek  
 24 out and receive fully informed legal advice.” *In re City of Erie*, 473 F.3d 413, 419 (2d Cir.  
 25 2007).

26  
 27  
 28 <sup>5</sup> The Government has filed a writ of mandamus with the Ninth Circuit challenging the district  
 court’s ruling in *Karnoski v. Trump*, No. 18-35347 (9th Cir.).



1 Plaintiff claims that this is a “blanket assertion” of the privilege that should be “extremely  
 2 disfavored” under *United States v. Martin*. See 278 F.3d 988, 1000 (9th Cir. 2002). But in that  
 3 case, the court found that the party attempting to assert the privilege had not “identif[ed] specific  
 4 communications and the grounds supporting the privilege as to each piece of evidence over  
 5 which privilege [was] asserted.” *Id.* Here, instead, DOJ and FBI provided Twitter with a  
 6 detailed privilege log describing each of the documents, and have further provided along with  
 7 this opposition a declaration describing the documents in detail and the grounds supporting the  
 8 privilege with respect to each document. See Bessee Decl. at 4-25. Both the privilege log and  
 9 the declarations make clear that the documents at issue do, in fact, fulfill all the requirements of  
 10 the privilege, and that the privilege has not been waived.<sup>6</sup> See *id.*

11 Next, plaintiff claims that the assertions would only be sufficient if they discussed “what  
 12 sorts of legal issues” were supposedly discussed in the document, citing to this Court in *Elec.*  
 13 *Frontier Found. v. Dep’t of Justice* (“*EFF*”), No. 15-CV-03186-MEJ, 2016 WL 7406429, at \*7  
 14 (N.D. Cal. Dec. 22, 2016), and to the District of Oregon in *Riverkeeper v U.S. Army Corps of*  
 15 *Eng’rs*, 38 F. Supp. 3d 1207 (D. Or. 2014). Reading Plaintiff’s brief, it would appear that the  
 16 only way to assert the attorney-client privilege would be to reveal the privileged information  
 17 itself. Unsurprisingly, neither *EFF* nor *Riverkeeper* stand for such a proposition. *EFF* found  
 18 that the party attempting to assert the privilege had failed entirely to show that the documents at  
 19 issue contained legal advice and that they had not discussed “*even generally* what sorts of legal  
 20 issues” were presented, not that that party needed to describe those legal issues with specificity  
 21 in order to protect the documents from release. *EFF*, 2016 WL 7406429, at \*7 (emphasis  
 22 added). Moreover, in *Riverkeeper*, the Court found that the documents at issue in that case could  
 23 not be protected by the attorney-client privilege because the *Vaughn* index descriptions simply  
 24 repeated the requirements of the privilege in a conclusory fashion.

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25 <sup>6</sup> Plaintiff cites a case, *Wiener v. FBI*, for the proposition that an assertion of the attorney client  
 26 privilege must be “tailor[ed] . . . to the specific document withheld.” 943 F.2d 972, 978–79 (9th  
 27 Cir. 1991). That case does not have to do with the attorney-client privilege at all, nor with any  
 28 other privilege applicable here, but rather with the sufficiency of a *Vaughn* index in a FOIA case  
 that asserted various FOIA exemptions not at issue in this case. See *id.* Nonetheless, both the  
 privilege log and the Government’s declarations are, in fact, tailored to each specific document.



1 Here, in contrast, the privilege logs and the declarations go through each document in  
 2 detail, and describe with as much specificity as possible the subjects of discussion. *See* Decl. at  
 3 5-32. The descriptions also identify what the roles of particular attorneys were in the  
 4 discussions, and how the discussions furthered obtaining advice for the governmental client. *See*  
 5 *id.* These are the exact kinds of documents that should be shielded by the attorney-client  
 6 privilege, and without which the government could not count on its attorneys to provide  
 7 unvarnished, candid legal advice.

8 Similarly, the attorney work product doctrine protects documents and other memoranda  
 9 prepared by an attorney in anticipation of litigation. *See* Fed. R. Civ. P. 26(b)(3); *Hickman v.*  
 10 *Taylor*, 329 U.S. 495 (1947). To qualify for work product protection, “documents must have two  
 11 characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they  
 12 must be prepared by or for another party or by or for that other party’s representative.” *In re*  
 13 *Cal. Pub. Utils. Comm’n*, 892 F.2d 778, 780-81 (9th Cir. 1989) (internal quotation marks  
 14 removed). At the time these documents were created, Twitter had publically announced that it  
 15 was considering litigation. *See* “Fighting for more #transparency,” Twitter, Inc. Blog, (Feb. 6,  
 16 2014) (“[W]e have pressed the U.S. Department of Justice to allow greater transparency . . . We  
 17 are also considering legal options we may have to seek to defend our First Amendment rights.”);  
 18 *see also* Bessee Decl. ¶ 5; Declaration of Patrick Findlay (“Findlay Decl.”), Acting Chief and  
 19 Special Counsel, Office of Strategy Management and Development, National Security Division,  
 20 Department of Justice, ¶ 3, *attached as* Ex. B; Decl. of Julia A. Heiman (“Heiman Decl.”),  
 21 Senior Counsel, Federal Programs Branch, Civil Division, Department of Justice, ¶ 3-5, *attached*  
 22 *as* Ex. C. It is incontestable that these documents were prepared “in anticipation of pending  
 23 litigation or for trial.” Fed. R. Civ. P. 26(b)(3).

24 Plaintiff claims that the documents protected by the work product doctrine were not  
 25 prepared in “anticipation of litigation” because they served a “dual purpose,” that is, they also  
 26 served to respond to Twitter’s request for the FBI to review Twitter’s proposed report and would  
 27 have “been created in substantially similar form” irrespective of the prospect of litigation. *See*  
 28 Pls.’ Mot. at 10. But Plaintiff misses a key aspect of the doctrine that is integral to why these

documents are properly protected by the privilege. In the Ninth Circuit, when faced with a document that potentially serves both a litigation and a non-litigation purpose, the correct inquiry is whether the “in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained *because of* the prospect of litigation.” *See In re Grand Jury Subpoena, Mark Torf/Torf Envtl. Mgmt. (Torf)*, 357 F.3d 900, 907 (9th Cir. 2004). Where the documents’ “litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole,” the documents are entitled to work product protection. *Id.* at 910.

This scenario is exactly of the kind in which the threat of litigation cannot be extricated from the non-litigation purpose. The Government was looking to respond to Twitter’s request with full knowledge that Twitter was considering filing suit, thus any inquiry into the proper response “can be fairly said to have been prepared . . . because of the prospect of litigation.” *Id.* at 907. Although Twitter claims that the Government “would have been required to engage in the same deliberations about whether to classify portions of Twitter’s Transparency Report regardless of its anticipation of Twitter’s suit,” these documents encompass not only the operational deliberations about whether and what portions of the Transparency Report were classified, but also the thoughts, impressions, and opinions of attorneys regarding the legal risk associated with that task and how best to protect the Government’s interests in reasonably anticipated litigation with Twitter and other providers seeking to publish information regarding their receipt of national security legal process. *See, e.g.,* Bessee Decl. at 5 (Sample 1 contains “written communications prepared by a Deputy General Counsel of the FBI, reflecting his mental impressions and opinion as well as the mental impressions and opinions of other Executive Branch attorneys, prepared and developed in anticipation of litigation concerning Twitter’s draft transparency report and potential litigation by other similarly situated individuals or entities”); *see also* Findlay Decl.; Heiman Decl.

Moreover, as discussed above, Twitter’s contention that the “mental impressions” of attorneys are at issue in this case is simply incorrect. *See* Pls.’ Mot. at 11. This Court’s First Amendment analysis does not turn on mental impressions—assuming *arguendo* that the strict

scrutiny standard applies, it turns on whether “disclosure of the information in the Draft Transparency Report would present such a grave and serious threat of damage to national security as to meet the applicable strict scrutiny standard.” July 6, 2017 Order at 2. Twitter has not shown any need to see information validly protected as work product, because the mental impressions of government attorneys in anticipation of litigation, or indeed, after the commencement of Twitter’s lawsuit, are not at issue in this case.

### **CONCLUSION**

For the foregoing reasons, this Court should deny Plaintiff’s Motion Challenging Defendants’ Privilege Designations in full.

Dated: March 1, 2019

Respectfully submitted,

JOSEPH H. HUNT  
Assistant Attorney General

DAVID L. ANDERSON  
United States Attorney

ANTHONY J. COPPOLINO  
Deputy Branch Director

/s/  
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*Attorneys for Defendants*

# Exhibit A

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Assistant Attorney General  
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Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

TWITTER, INC.,

Plaintiff,

v.

WILLIAM P. BARR, Attorney  
General of the United States, *et al.*,

Defendants.

Case No. 14-cv-4480-YGR

**DECLARATION OF CECILIA  
O. BESSEE, FEDERAL BUREAU  
OF INVESTIGATION**

Hon. Yvonne Gonzalez Rogers

I, Cecilia O. Bessee, hereby declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am the Acting Deputy General Counsel for the Litigation Branch of the Federal Bureau of Investigation ("FBI") Office of the General Counsel ("OGC"). As Acting Deputy



1 General Counsel, my principal responsibilities are to advise the General Counsel and other senior  
2 executive management of the FBI regarding litigation concerns affecting the agency and to  
3 oversee the work of the FBI OGC Litigation Branch. This declaration is submitted in support of  
4 the Government's Response to Twitter's Motion Challenging Defendants' Privilege  
5 Designations in the above-captioned civil action.

6 2. Through the exercise of my official duties, I am informed of the general subject  
7 matter of this lawsuit, and I have been briefed regarding the instant motion, in which Twitter  
8 requests an order from the Court overruling the Government's objections to production of certain  
9 documents, in whole or in part, on the bases of the deliberative process, attorney work product,  
10 and attorney client privileges and compelling production by the Government of a set of  
11 documents referred to by Twitter as the "Bellwether Documents," and potentially of other  
12 documents over which the Government has asserted similar privilege claims.

13 3. The statements contained in this declaration are based upon my personal  
14 knowledge, my review and consideration of documents and information available to me in my  
15 official capacity, and on information provided to me by other FBI employees. My conclusions  
16 have been reached in accordance therewith.

17 4. I have reviewed 17 of the documents identified by Twitter as "Bellweather  
18 Documents," the production of which the FBI or DOJ objected to in whole or in part on the basis  
19 of some or all of the above-stated privileges. On behalf of the FBI, I hereby formally invoke the  
20 deliberative process privilege over these documents, where identified below in paragraph 7; I  
21 also explain the bases of the FBI's invocation of the attorney client privilege and work product  
22 protection over these documents where applicable. In sum, these documents are emails  
23 containing confidential communications among attorneys within FBI OGC, or among FBI OGC  
24 attorneys and an FBI operational subject matter expert or other Departmental attorneys,  
25 including within the Department of Justice (DOJ) National Security Division ("NSD") and  
26 Office of the Deputy Attorney General ("ODAG"). The attorneys involved in these  
27 communications represented and advised the FBI regarding the FBI's response to Twitter's  
28 request for the FBI's review of Twitter's draft transparency report in April 2014. Certain

1 communications discussed herein also included other agencies within the Intelligence  
2 Community, where their input was needed regarding Twitter's request. I understand that during  
3 the time that these communications were ongoing, Twitter had indicated that it was considering  
4 legal action, and that the FBI and other Departmental attorneys advising the FBI as to Twitter's  
5 request anticipated that litigation related to Twitter's request was likely to result if Twitter was  
6 not satisfied with the FBI's response. *See, e.g.,* Posting of Jeremy Kessel to Twitter Blog,  
7 Fighting for more #transparency, [https://blog.twitter.com/official/en\\_us/a/2014/fighting-for-](https://blog.twitter.com/official/en_us/a/2014/fighting-for-more-transparency.html)  
8 [more-transparency.html](https://blog.twitter.com/official/en_us/a/2014/fighting-for-more-transparency.html), (Feb. 6, 2014); Julian Hatttem, *Twitter threatens to sue Obama*  
9 *administration*, The Hill, Feb. 6, 2014, [https://thehill.com/policy/technology/197646-twitter-](https://thehill.com/policy/technology/197646-twitter-considers-legal-fight-to-disclose-docs)  
10 [considers-legal-fight-to-disclose-docs](https://thehill.com/policy/technology/197646-twitter-considers-legal-fight-to-disclose-docs); *Twitter Threatens to Sue Obama Administration Over*  
11 *Gov't Surveillance Requests*, CBS Local Washington, DC, Feb. 6, 2014,  
12 [https://washington.cbslocal.com/2014/02/06/twitter-threatens-to-sue-obama-administration-over-](https://washington.cbslocal.com/2014/02/06/twitter-threatens-to-sue-obama-administration-over-govt-surveillance-requests/)  
13 [govt-surveillance-requests/](https://washington.cbslocal.com/2014/02/06/twitter-threatens-to-sue-obama-administration-over-govt-surveillance-requests/). The threat of litigation from Twitter, which preceded Twitter's  
14 April 2014 submission to the FBI, informed the analysis of the attorneys advising the FBI as to  
15 its response to Twitter's request.

16 6. I address each of these documents, seriatim, below. Each is identified by the  
17 "sample" number assigned to it by Twitter and by its title, which is the "Subject" line of the  
18 email in question. For each document, I provide its date and a brief description of the document,  
19 followed by an explanation of the bases for the applicable invocation of privilege.

20 7. As noted below, each of these documents was prepared in confidence; has at all  
21 times been maintained in confidence; and has not been shared with any third party. As discussed  
22 below, each of the documents discussed herein contains preliminary discussions among attorneys  
23 representing the FBI in furtherance of that representation, and as part of the analysis of how best  
24 to address a given decision (whether in the context of determining how best to respond to  
25 Twitter's request to review its draft transparency report, or in determining how to respond to a  
26 similar request by another entity). The ability of attorneys representing the FBI or its personnel  
27 to openly discuss their views and engage in candid give-and-take among each other and with  
28 their client – in some cases, the agency, in other cases, an employee who is sued in his or her



individual capacity – is essential to their ability to render high quality legal advice and representation, and, in turn, to facilitate the FBI’s lawful execution of its operational mission. This critically important candid discussion among attorneys representing the FBI and between the attorneys and their clients will be chilled, to the detriment of vital public policy interests, if these public servants fear that their preliminary discussions, drafts, and questions, will be subject to disclosure to litigants or the general public.

**Sample 1** (FBI production)<sup>1</sup>

Document Title: “RE: Transparency Response?”

Date: May 9, 2014

i. General description of the document: This document is an email conveying to the FBI General Counsel the advice and preliminary opinions of the FBI Deputy General Counsel for the National Security Law Branch (“NSLB”), concerning the manner in which the FBI would respond to communications from Twitter to the FBI regarding Twitter’s proposed transparency report, as well as the status of discussions and deliberations concerning the same with other Executive Branch personnel. In addition, the email updates the General Counsel regarding discussions within FBI OGC and with DOJ regarding potential litigation strategy in a separate national security matter that did not relate to Twitter’s proposed transparency report. This document was prepared in confidence, has at all times been maintained in confidence, and it has not been shared with any third party.

ii. Deliberative information contained in the document: The email contains the advice and preliminary opinions of an FBI Deputy General Counsel, based upon his knowledge of past and anticipated future litigation, and reflects not only his deliberations, but also those of other Executive Branch personnel, concerning the manner in which the FBI would respond to communications from Twitter to FBI OGC regarding its proposed transparency report. This document was prepared in the deliberative process, and disclosure would divulge the preliminary

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<sup>1</sup> I am informed that the documents identified as Samples 1–3, 8–10, 12, and 14 were produced by the FBI to Twitter in partially redacted form, and I have reviewed both the unredacted and redacted versions of these documents. I am further informed that the documents identified as Samples 4–7, 11, 13, and 15–17 were withheld in entirety from DOJ’s document production to Twitter, and I have reviewed unredacted versions of these documents.

1 opinions, recommendations, and advice generated in the decision-making process of the  
2 government. This document does not represent final action, but instead contains predecisional  
3 deliberations. The document reflects advice and opinions that are internal to the government  
4 concerning the manner in which the FBI would respond to communications from Twitter to FBI  
5 OGC regarding its proposed transparency report. In addition, this document contains the advice  
6 and preliminary opinions of an FBI Deputy General Counsel and reflects the advice and  
7 preliminary opinions of DOJ counsel regarding potential litigation strategy in a separate national  
8 security matter that did not relate to Twitter's proposed transparency report. Release of the  
9 document would harm the decision-making process by revealing preliminary opinions shared  
10 between agency employees, discouraging open, candid communication.

11 iii. Attorney client information contained in the document: This document contains  
12 confidential communications between an FBI Deputy General Counsel and the FBI General  
13 Counsel conveying legal advice rendered to the General Counsel in order for the General  
14 Counsel to issue a statement on behalf of the agency. These communications were made in  
15 furtherance of the FBI's legal representation by a professional legal adviser in his capacity as a  
16 lawyer. Disclosure of confidential communication among FBI attorneys in furtherance of their  
17 representation of their client -- in this case, the agency -- would impede the agency's ability to  
18 candidly seek legal advice and the attorneys' ability to candidly provide such advice, which is  
19 necessary to the operational mission of the FBI and the professional mission of FBI attorneys.

20 iv. Work product contained in the document: This document contains written  
21 communications prepared by a Deputy General Counsel of the FBI, reflecting his mental  
22 impressions and opinion as well as the mental impressions and opinions of other Executive  
23 Branch attorneys, prepared and developed in anticipation of litigation concerning Twitter's draft  
24 transparency report and potential litigation by other similarly situated individuals or entities  
25 seeking to disclose information concerning their receipt of national security process. In addition,  
26 this document contains written communications prepared by a Deputy General Counsel of the  
27 FBI, reflecting his mental impressions and opinions as well as the mental impressions and  
28



1 opinions of DOJ counsel, prepared and developed in anticipation of litigation in a separate  
2 national security matter that did not relate to Twitter's proposed transparency report.

3 **Sample 2** (FBI production)

4 Document Title: "RE: Transparency Response?"

5 Date: July 3–7, 2014

6 i. General description of the document: This document contains several emails among FBI  
7 OGC attorneys and among the FBI General Counsel, FBI Deputy General Counsel for NSLB,  
8 FBI OGC attorneys, and an FBI operational subject matter expert, seeking and conveying  
9 preliminary opinions and recommendations concerning the manner in which the FBI would  
10 respond to communications from Twitter to the FBI OGC regarding Twitter's proposed  
11 transparency report, and the process that the FBI should follow in preparing that response. This  
12 document was prepared in confidence, has at all times been maintained in confidence, and it has  
13 not been shared with any third party.

14 ii. Deliberative information contained in the document: This document contains the legal  
15 and operational advice and preliminary opinions of several FBI OGC attorneys, as well as the  
16 General Counsel, and reflects their deliberations concerning the manner in which the FBI would  
17 respond to communications from Twitter to the FBI regarding its proposed transparency report,  
18 and the process the FBI should follow in preparing that response. The conversation contained in  
19 the email exchange reflects the deliberative process and disclosure would divulge the preliminary  
20 opinions, recommendations, and advice generated in the decision-making process of the  
21 government. This document does not represent final action, but instead reflects predecisional  
22 deliberations. Release of the document would harm the decision-making process by revealing  
23 preliminary opinions shared between agency employees, discouraging open, candid  
24 communication.

25 iii. Attorney client information contained in the document: This document contains  
26 confidential communications among FBI OGC attorneys and among the FBI General Counsel,  
27 FBI Deputy General Counsel, FBI OGC attorneys, and an FBI operational subject matter expert  
28 made during the process of seeking and conveying legal advice, in order for the General Counsel

1 to issue a statement on behalf of the agency. These communications were made in furtherance of  
2 the FBI's legal representation by professional legal advisers in their capacities as lawyers. These  
3 communications also reflect the General Counsel seeking and receiving operational advice from  
4 an FBI OGC attorney in furtherance of the General Counsel's representation of the agency, in  
5 particular, to inform the legal advice he would be providing to the agency. Disclosure of the  
6 confidential communications among FBI attorneys in furtherance of their representation of their  
7 client – in this case, the agency -- would impede the FBI's ability to candidly seek legal advice,  
8 which is necessary to the operational mission of the FBI and the professional mission of FBI  
9 attorneys.

10 iv. Work product contained in the document: This document contains written  
11 communications prepared by FBI OGC attorneys, reflecting their thoughts, opinions, and mental  
12 impressions, prepared and developed in anticipation of litigation concerning Twitter's proposed  
13 draft transparency report and potential litigation by other individuals or entities who would seek  
14 to publish similar information.

15 **Sample 3** (FBI production)

16 Document Title: "RE: Transparency Response?"

17 Date: July 3–7, 2014

18 i. General description of the document: This document contains several emails among the  
19 FBI General Counsel, FBI Deputy General Counsel for NSLB, FBI OGC attorneys, and an FBI  
20 operational subject matter expert, seeking and conveying preliminary opinions and  
21 recommendations concerning the FBI's response to communications from Twitter to FBI OGC  
22 regarding Twitter's proposed transparency report. This document was prepared in confidence,  
23 has at all times been maintained in confidence, and it has not been shared with any third party.

24 ii. Deliberative information contained in the document: This document contains the legal  
25 and operational advice and preliminary opinions of several FBI OGC attorneys, as well as the  
26 FBI General Counsel and FBI Deputy General Counsel for NSLB, and reflects their preliminary  
27 deliberations concerning the FBI's response to communications from Twitter to FBI OGC  
28 regarding its proposed transparency report, and the process the FBI should follow in preparing



1 that response. It was prepared in the deliberative process and disclosure would divulge the  
 2 preliminary opinions, recommendations, and advice generated in the decision-making process of  
 3 the government. This document does not represent final action, but instead reflects predecisional  
 4 deliberations. Release of the document would harm the decision-making process by revealing  
 5 preliminary opinions shared between agency employees, discouraging open, candid  
 6 communication.

7 iii. Attorney client information contained in the document: This document contains  
 8 confidential communications among FBI OGC attorneys and the FBI General Counsel and FBI  
 9 Deputy General Counsel for NSLB made during the process of seeking and conveying legal  
 10 advice to the FBI General Counsel in order for the General Counsel to issue a statement on  
 11 behalf of the agency. These communications were made in furtherance of the FBI's legal  
 12 representation by professional legal advisers in their capacities as lawyers. These  
 13 communications also reflect the General Counsel seeking and receiving operational advice from  
 14 an FBI OGC attorney in furtherance of the General Counsel's representation of the agency, in  
 15 particular, to inform the legal advice he would be providing to the agency. Disclosure of the  
 16 confidential communications among FBI attorneys in furtherance of their representation of their  
 17 client – in this case, the agency -- would impede the FBI's ability to candidly seek legal advice,  
 18 which is necessary to the operational mission of the FBI and the professional mission of FBI  
 19 attorneys.

20 iv. Work product contained in the document: This document contains written  
 21 communications prepared by FBI OGC attorneys, reflecting their opinions and mental  
 22 impressions, prepared and developed in anticipation of litigation involving Twitter and other  
 23 individuals or entities seeking to disclose information concerning their receipt of national  
 24 security process.

25 **Sample 4** (DOJ production)

26 Document Title: "RE: Transparency Response?"

27 Date: April 29, 2014–July, 12, 2014

i. General description of the document: This document contains an email in which the FBI General Counsel, copying FBI OGC attorneys and an FBI operational subject matter expert, consults attorneys in DOJ NSD, seeking their input regarding the FBI's response to communications from Twitter to FBI OGC regarding Twitter's proposed transparency report. The document then includes an email discussion regarding the process of preparing the FBI's potential response to Twitter's communications among NSD and ODAG attorneys.<sup>2</sup> This document was prepared in confidence, has at all times been maintained in confidence, and it has not been shared with any third party.

ii. Deliberative information contained in the document: This document reflects the FBI's and NSD's deliberations concerning the FBI's response to communications from Twitter to FBI OGC regarding Twitter's proposed transparency report. This document does not represent the FBI's final action or decision, but instead reflects predecisional discussions among attorneys who were advising the FBI, either as its in-house counsel, or as legal advisers within DOJ NSD or ODAG. Release of the document would harm the decision-making process by exposing the preliminary thoughts and discussions shared between agency employees, discouraging open, candid communication.

iii. Attorney client information contained in the document: This document contains confidential communications among the FBI General Counsel and attorneys at NSD and ODAG, who would be advising the FBI concerning the FBI's response to communications from Twitter regarding Twitter's proposed transparency report, as well as a follow up email exchange regarding preparing the FBI's potential response among NSD and ODAG attorneys who would be advising the FBI regarding its response. The two initial emails from the General Counsel request legal advice from NSD attorneys, and the subsequent email discussion among NSD and ODAG attorneys includes analysis regarding confidential communications with the FBI and consideration of further information that would be needed to inform decision making as to FBI's

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<sup>2</sup> As stated above, I understand that this document was withheld in entirety from DOJ's production to Twitter. I am informed that, pursuant to an agreement between litigation counsel for the parties, the portions of this document that constitute communications between the FBI General Counsel and Twitter's counsel were not produced, because the same exchange had already been provided to Twitter in the Government's productions.



1 response, as well as the factors that should inform the process of preparing the FBI's response.  
 2 Disclosure of the confidential communications among FBI, NSD, and ODAG attorneys in  
 3 furtherance of their representation of their client, *i.e.* the agency, would impede the FBI's ability  
 4 to candidly seek legal advice, which is necessary to the operational mission of the FBI and the  
 5 professional mission of its attorneys.

6 **Sample 5** (DOJ production)

7 Document Title: "RE: Transparency Response?"

8 Date: April 29–July 16, 2014

9 i. General description of the document: This document contains emails in which the FBI  
 10 General Counsel, copying FBI OGC attorneys and an FBI operational subject matter expert,  
 11 consults attorneys in NSD seeking their input regarding the FBI's response to communications  
 12 from Twitter to FBI OGC regarding Twitter's proposed transparency report. The document then  
 13 includes an NSD attorney's response seeking information from the FBI General Counsel in  
 14 furtherance of NSD's representation of the FBI as to that issue, and bringing ODAG attorneys  
 15 into the conversation so that they could offer their advice to the FBI as to this issue as well.<sup>3</sup>  
 16 This document was prepared in confidence, has at all times been maintained in confidence, and it  
 17 has not been shared with any third party.

18 ii. Deliberative information contained in the document: This document reflects the  
 19 deliberations of the FBI, NSD, and ODAG concerning the FBI's response to communications  
 20 from Twitter to the FBI regarding Twitter's proposed transparency report. This document does  
 21 not represent the FBI's final action or decision, but instead reflects predecisional discussions  
 22 among attorneys who were advising the FBI, either as its in-house counsel, or as legal advisers  
 23 within DOJ NSD or ODAG. Release of the document would harm the decision-making process  
 24 by exposing the preliminary discussions shared between agency employees, discouraging open,  
 25 candid communication.

26 <sup>3</sup> I understand that this document was withheld in entirety from DOJ's production to  
 27 Twitter, and I am informed that, pursuant to an agreement between litigation counsel for the  
 28 parties, the portions of this document that constitute communications between the FBI General  
 Counsel and Twitter's counsel were not produced, because the same exchange had already been  
 provided to Twitter in the Government's productions.



iii. Attorney client information contained in the document: This email exchange contains confidential communications among the FBI General Counsel and attorneys at NSD and ODAG, who would be advising the FBI in connection with the FBI's response to communications from Twitter regarding Twitter's proposed transparency report. Two of the emails contained in this documents are communications from the FBI General Counsel requesting legal advice from NSD attorneys, while the final email from an NSD attorney adds attorneys from ODAG to the conversation and seeks information in furtherance of NSD's and ODAG's representation of the FBI as to Twitter's request. Disclosure of the confidential communications among FBI, NSD, and ODAG attorneys in furtherance of their representation of their client – in this case, the agency – would impede the FBI's ability to candidly seek legal advice, which is necessary to the operational mission of the FBI and the professional mission of its attorneys.

**Sample 6** (DOJ production)

Document Title: "RE: Transparency Response?"

Date: April 29–July 17, 2014

i. General description of the document: This document contains emails in which the FBI General Counsel, copying FBI OGC attorneys and an FBI operational subject matter expert, consults attorneys in NSD seeking their input regarding the FBI's response to communications from Twitter regarding Twitter's proposed transparency report. The document then includes an NSD attorney's response seeking information from the FBI General Counsel in furtherance of NSD's representation of the FBI as to that issue, and bringing ODAG attorneys into the conversation so that they could offer their advice to the FBI as to this issue as well. A discussion then follows regarding the process of preparing the FBI's response.<sup>4</sup> This document was

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<sup>4</sup> I understand that this document was withheld in entirety from DOJ's production to Twitter, and I am informed that, pursuant to an agreement between litigation counsel for the parties, the portions of this document that constitute communications between the FBI General Counsel and Twitter's counsel were not produced, because the same exchange had already been provided to Twitter in the Government's production. Additionally, I understand that portions of this document addressing scheduling were not produced pursuant to an agreement between litigation counsel that materials that were not substantive would not be produced.

1 prepared in confidence, has at all times been maintained in confidence, and it has not been shared  
2 with any third party.

3 ii. Deliberative information contained in the document: This document reflects the FBI's  
4 and NSD's deliberations concerning the FBI's response to communications from Twitter  
5 regarding Twitter's proposed transparency report, and the process of preparing that response.  
6 This document does not represent the FBI's final action or decision, but instead reflects  
7 predecisional discussions among attorneys who were advising the FBI, either as its in-house  
8 counsel, or as legal advisers within DOJ NSD or ODAG. Release of the document would harm  
9 the decision-making process by exposing the preliminary discussions shared between agency  
10 employees, discouraging open, candid communication.

11 iii. Attorney client information contained in the document: This email exchange contains  
12 confidential communications among the FBI General Counsel and attorneys at NSD and ODAG,  
13 who would be advising the FBI in connection with the FBI's response to communications from  
14 Twitter regarding its proposed transparency report. The two initial emails from the General  
15 Counsel request legal advice from NSD attorneys, while a subsequent exchange adds attorneys  
16 from ODAG to the conversation and continues the conversation regarding the process of  
17 preparing the FBI's response to Twitter's request, in furtherance of NSD's and ODAG's  
18 representation of the FBI as to Twitter's request. Disclosure of the confidential communications  
19 among FBI, NSD, and ODAG attorneys in furtherance of their representation of their client – in  
20 this case, the agency – would impede the FBI's ability to candidly seek legal advice, which is  
21 necessary to the operational mission of the FBI and the professional mission of its attorneys.

22 **Sample 7** (DOJ production)

23 Document Title: "FW: Twitter Transparency Report"

24 Date: August 1, 2014

25 i. General Description of the document: This document contains an email from the FBI  
26 General Counsel to FBI OGC attorneys, an FBI operational subject matter expert, and an NSD  
27 attorney, conveying his opinions and mental impressions in response to an email from Twitter's  
28 counsel, including conveying his opinions and mental impressions regarding a prior conversation



1 with Twitter's counsel regarding Twitter's communications concerning its proposed  
2 transparency report.<sup>5</sup> This document was prepared in confidence, has at all times been  
3 maintained in confidence, and it has not been shared with any third party.

4 ii. Deliberative information contained in the document: This document reflects the FBI's  
5 General Counsel providing information, including his opinion and mental impressions, to other  
6 attorneys representing the FBI with respect to Twitter's request, as well as to an FBI subject  
7 matter expert, as part of the deliberative process of preparing the FBI's response to Twitter's  
8 request. This document does not represent the FBI's final action or decision, but instead reflects  
9 predecisional discussions among attorneys who were advising the FBI, either as its in-house  
10 counsel, or as a legal adviser within DOJ NSD. Release of the document would harm the  
11 decision-making process by exposing the preliminary discussions shared between agency  
12 employees, discouraging open, candid communication.

13 iii. Attorney client information contained in the document: This email exchange constitutes  
14 confidential communications among the FBI General Counsel and other attorneys at FBI and  
15 NSD, who would be advising the FBI in connection with the FBI's response to communications  
16 from Twitter regarding Twitter's proposed transparency report. The General Counsel's email  
17 shares information in furtherance of those attorneys' provision of advice to the FBI in connection  
18 with Twitter's communications. Disclosure of the confidential communications among FBI and  
19 ODAG attorneys in furtherance of their representation of their client – in this case, the agency --  
20 would impede the FBI's ability to candidly seek legal advice, which is necessary to the  
21 operational mission of the FBI and the professional mission of its attorneys.

22 iv. Work product contained in the document: This document contains a written  
23 communication prepared by the FBI General Counsel reflecting his opinions and mental  
24 impressions, prepared and developed in anticipation of litigation involving Twitter and potential  
25

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26 <sup>5</sup> I understand that this document was withheld in entirety from DOJ's production to  
27 Twitter, and I am informed that, pursuant to an agreement between litigation counsel for the  
28 parties, the portion of this document that constitutes a communication from Twitter's counsel to  
the FBI's General Counsel was not produced, because the same exchange had already been  
provided to Twitter in the Government's productions.

1 litigation by other individuals or entities seeking to disclose information concerning their receipt  
2 of national security process.

3 **Sample 8** (FBI production)

4 Document Title: "Twitter's proposed transparency report"

5 Date: August 22, 2014

6 i. General Description of the document: This document contains several emails among FBI  
7 OGC attorneys, copying an administrative assistant of the General Counsel, regarding advice and  
8 preliminary opinions, and discussing deliberations and coordinated review within the U.S.

9 Intelligence Community (USIC), concerning the classified information contained in Twitter's  
10 proposed transparency report. This document was prepared in confidence, has at all times been  
11 maintained in confidence, and it has not been shared with any third party.

12 ii. Deliberative information contained in the document: This document contains the  
13 transmission of operational advice and preliminary opinions of FBI OGC attorneys concerning  
14 the classified information contained in Twitter's proposed transparency report, and coordinating  
15 review of that information within the USIC. This document does not represent final action, but  
16 instead reflects and discusses the very process of preliminary decision making. Release of the  
17 document would harm the deliberative process by revealing the process by which the participants  
18 in the discussion made their decisions, discouraging open, candid communication.

19 iii. Attorney client privileged information contained in the document: This document  
20 contains confidential communications among FBI OGC attorneys, discussing transmittal of  
21 operational advice to the General Counsel in furtherance of his and other OGC attorneys'  
22 representation of the FBI, to facilitate their provision of legal advice to the FBI regarding its  
23 response to communications from Twitter concerning its proposed transparency report. These  
24 communications were made in furtherance of the FBI's legal representation by professional legal  
25 advisers in their capacities as lawyers. Disclosure of the confidential communications among  
26 FBI attorneys in furtherance of their representation of their client -- in this case, the agency --  
27 would impede the FBI's ability to candidly seek legal advice, which is necessary to the  
28 operational mission of the FBI and the professional mission of FBI attorneys.



iv. Work product contained in the document: This document contains written communications prepared by FBI OGC attorneys, reflecting their opinions and mental impressions, prepared and developed in anticipation of litigation involving Twitter.

**Sample 9** (FBI production)

Document Title: "RE: Twitter"

Date: October 16, 2014

i. General Description of the document: This document contains emails between the FBI Assistant General Counsel assigned to this litigation and DOJ litigators discussing the FBI's deliberations regarding information contained in Twitter's proposed transparency report as well as discussions concerning how the instant litigation may unfold. The emails also contain advice and opinions concerning the government's response to the Complaint Twitter filed in the district court. This document was prepared in confidence, has at all times been maintained in confidence, and it has not been shared with any third party.

ii. Deliberative information contained in the document: This document contains discussions regarding the FBI's decision-making and preliminary opinions regarding the classified information contained in Twitter's proposed transparency report, as well as deliberations among DOJ litigators and FBI counsel regarding how to proceed in the instant litigation. It was prepared in the deliberative process and disclosure would divulge the preliminary opinions, recommendations, and advice generated in the decision-making process of the government. This document does not represent final action, but instead reflects predecisional deliberations. Release of the document would harm the decision-making process by revealing preliminary opinions shared between agency employees, discouraging open, candid communication.

iii. Attorney client information contained in the document: This document contains confidential communications among an FBI Assistant General Counsel and DOJ litigators made during the process of conveying legal advice to the FBI in connection with the instant case, and seeking and providing information in furtherance of the representation of the FBI in this action. Disclosure of these confidential communications between an FBI attorney representing the client agency, *i.e.* FBI, and DOJ litigators would impede the FBI's ability to candidly seek legal advice,

1 which is necessary to the operational mission of the FBI and the professional mission of FBI and,  
2 in this case, DOJ attorneys.

3 iv. Work product contained in the document: This document contains written  
4 communications prepared by the FBI Assistant General Counsel and DOJ litigators responsible  
5 for this action, reflecting their mental impressions, prepared and developed during the instant  
6 litigation. The communications in this document contain advice and discussion among counsel  
7 regarding how to defend the interests of the United States in the instant litigation with Twitter,  
8 and in anticipation of potential litigation by other individuals or entities seeking to disclose  
9 information concerning their receipt of national security process.

10 **Sample 10** (FBI production)

11 Document Title: "RE: Twitter"

12 Date: November 5–6, 2014

13 i. General Description of the document: This document contains emails between FBI OGC  
14 and DOJ litigators discussing the FBI's deliberations regarding information contained in  
15 Twitter's proposed transparency report. The email also contains advice and opinions concerning  
16 the government's response to the Complaint Twitter filed in the district court. This document  
17 was prepared in confidence, has at all times been maintained in confidence, and it has not been  
18 shared with any third party.

19 ii. Deliberative information contained in the document: This document contains  
20 information reflecting the FBI's decision-making regarding the classified information contained  
21 in Twitter's proposed transparency report. It was prepared in the deliberative process and  
22 disclosure would divulge the preliminary opinions, recommendations, and advice generated in  
23 the decision-making process of the government both with respect to Twitter's report and as to  
24 how to proceed in the instant litigation. This document does not represent final action, but  
25 instead reflects predecisional deliberations and includes a discussion of the deliberative process  
26 itself. Release of the document would harm the decision-making process by revealing  
27 preliminary opinions shared between agency employees, discouraging open, candid  
28 communication.



iii. Attorney client information contained in the document: This document contains confidential communications among FBI OGC and DOJ litigators made during the process of conveying legal advice to the FBI in connection with litigation in this case, and obtaining information from FBI in connection with that representation. These communications were made in furtherance of the FBI's legal representation by DOJ litigators. Disclosure of these confidential communications between FBI attorneys representing the client agency, *i.e.* FBI, and DOJ litigators would impede the FBI's ability to candidly seek legal advice, which is necessary to the operational mission of the FBI and the professional mission of FBI and, in this case, DOJ attorneys.

iv. Work product contained in the document: This document contains written communications prepared by FBI OGC attorneys and DOJ litigators, reflecting their opinions and mental impressions, prepared and developed during the instant litigation. The communications in this document contain advice and discussion among counsel regarding how to defend the interests of the United States in the instant litigation, and in anticipation of potential litigation by other individuals or entities seeking to disclose information concerning their receipt of national security process.

**Sample 11** (DOJ production)

Document Title: "Need to Talk"

Date: April 8–9, 2014

i. General Description of the document: This document is an email exchange in which the FBI Deputy General Counsel for NSLB seeks to speak with an attorney at NSD who would be advising the FBI regarding its response to communications from Twitter regarding Twitter's proposed transparency report and another legal issue not relevant to the instant matter.<sup>6</sup> This document was prepared in confidence, has at all times been maintained in confidence, and it has not been shared with any third party.

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<sup>6</sup> I understand that this document was withheld in its entirety from DOJ's production, and consistent with an agreement between litigation counsel that only substantive materials would be produced, a discussion of scheduling included in this email exchange was not produced to Twitter.



ii. Deliberative information contained in the document: The email constitutes part of the deliberative process of the FBI formulating its response to communications from Twitter regarding its draft transparency report; it does not represent final action, but instead reflects predecisional deliberations. Release of the document would harm the decision-making process by revealing the preliminary, decision-making process itself, and, discouraging open, candid communication.

iii. Attorney client information contained in the document: This document contains a confidential communication between the FBI Deputy General Counsel for NSLB and an NSD attorney for purposes of obtaining legal advice for the FBI concerning its response to communications from Twitter regarding Twitter's draft transparency report. This communication was made in furtherance of the FBI's legal representation by a professional legal adviser in her capacity as a lawyer. Disclosure of confidential communication between this FBI attorney and the NSD attorney in furtherance of their representation of their client – in this case, the agency -- would impede the FBI's ability to candidly seek legal advice, which is necessary to the operational mission of the FBI and the professional mission of the attorneys representing the agency.

iv. Work product contained in the document: This document contains a written communication prepared by the FBI Deputy General Counsel for NSLB, arranging to obtain legal advice from an NSD attorney as to the FBI's response to communications from Twitter regarding its draft transparency report, in anticipation of litigation by Twitter and potential litigation by other individuals or entities seeking to disclose information concerning their receipt of national security process.

**Sample 12** (FBI production)

Document Title: "Sample Transparency Letter"

Date: June 14, 2013

i. General Description of the document: This document is an email from an FBI OGC attorney to the FBI General Counsel seeking review by the General Counsel and his opinion concerning a proposed draft model letter from the General Counsel to an electronic

1 communications service provider regarding a pending transparency report, and attaching the  
2 draft proposed letter for the General Counsel's review and consideration. This document was  
3 prepared in confidence, has at all times been maintained in confidence, and it has not been shared  
4 with any third party.

5 ii. Deliberative information contained in the document: The email contains the preliminary  
6 opinion of an FBI OGC attorney formed in anticipation of imminent litigation and reflects the  
7 deliberations of FBI OGC personnel concerning the manner in which the FBI General Counsel  
8 could potentially respond to a communication from an electronic communications service  
9 provider regarding a proposed transparency report. This document was prepared in the  
10 deliberative process and disclosure would divulge the opinions, recommendations, and advice  
11 generated in the decision-making process of the government. This document does not represent  
12 final action, but instead reflects predecisional deliberations regarding the content of a draft  
13 document. Release of this document would harm the decision-making process by revealing  
14 preliminary opinions shared between agency employees, discouraging open, candid  
15 communication.

16 iii. Attorney client privileged information contained in the document: This document  
17 contains confidential communications between an FBI OGC attorney and the FBI General  
18 Counsel conveying legal advice rendered to and sought from the General Counsel in order for  
19 the General Counsel to issue a statement on behalf of the agency. These communications were  
20 made in furtherance of the FBI's legal representation by a professional legal adviser in her  
21 capacity as a lawyer. Disclosure of confidential communication between FBI attorneys in  
22 furtherance of their representation of their client -- in this case, the agency -- would impede the  
23 FBI's ability to candidly seek legal advice, which is necessary to the operational mission of the  
24 FBI and the professional mission of FBI attorneys.

25 iv. Work product contained in the document: This document contains written  
26 communications, including a draft document, prepared by an FBI OGC attorney, reflecting her  
27 mental impressions, prepared and developed in anticipation of imminent litigation involving an  
28 electronic communications service provider which, at that time, had indicated its intention to



1 publish a proposed draft transparency report, as well as potential litigation by other individuals  
2 or entities who would seek to publish similar information.

3 **Sample 13** (DOJ production)

4 Document Title: "RE: Transparency Response?"

5 Date: April 29–July 18, 2019

6 i. General description of the document: This document contains emails in which the FBI  
7 General Counsel, copying FBI OGC attorneys, an FBI operational subject matter expert, and  
8 ODAG counsel, consults NSD counsel, seeking their input regarding the FBI's response to  
9 communications from Twitter regarding its proposed transparency report. The document also  
10 contains an email discussion regarding the process of preparing the FBI's potential response to  
11 Twitter's communications among the General Counsel and NSD and ODAG attorneys.<sup>7</sup> This  
12 document was prepared in confidence, has at all times been maintained in confidence, and it has  
13 not been shared with any third party.

14 ii. Deliberative information contained in the document: This document reflects the FBI's  
15 and NSD's deliberations concerning the FBI's response to communications from Twitter  
16 concerning Twitter's proposed transparency report. This document does not represent the FBI's  
17 final action or decision, but instead reflects predecisional discussions among attorneys who were  
18 advising the FBI, either as its in-house counsel, or as legal advisers within DOJ NSD or ODAG.  
19 Release of the document would harm the decision-making process by exposing the preliminary  
20 thoughts and discussions shared between agency employees, discouraging open, candid  
21 communication.

22 iii. Attorney client information contained in the document: This email exchange contains  
23 confidential communications among the FBI General Counsel and attorneys at NSD and ODAG,  
24

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25 <sup>7</sup> I understand that this document was withheld in entirety from DOJ's production to  
26 Twitter. I am informed that, pursuant to an agreement between litigation counsel for the parties,  
27 the portions of this document that constitute communications between the FBI General Counsel  
28 and Twitter's counsel were not produced, because the same exchange had already been provided  
to Twitter in the Government's productions. Furthermore, I understand that a discussion of  
scheduling included in this email exchange was not produced to Twitter, consistent with an  
agreement between litigation counsel that only substantive materials would be produced.

1 who would be advising the FBI in connection with the FBI's response to communications from  
2 Twitter regarding Twitter's proposed transparency report, as well as a follow up email exchange  
3 regarding the process of preparing the FBI's response among the FBI General Counsel, NSD and  
4 ODAG attorneys who would be advising regarding the FBI's response. The two initial emails  
5 from the General Counsel request legal advice from NSD attorneys, and the subsequent email  
6 discussion among FBI, NSD, and ODAG attorneys is focused on process and setting up further  
7 conversations regarding the FBI's response. Disclosure of the confidential communications  
8 among FBI, NSD, and ODAG attorneys in furtherance of their representation of their client – in  
9 this case, the agency -- would impede the FBI's ability to candidly seek legal advice, which is  
10 necessary to the operational mission of the FBI and the professional mission of its attorneys.

11 **Sample 14** (FBI Production)

12 Document Title: "FW: Twitter Transparency Report"

13 Date: August 1–October 16, 2014

14 i. General Description of the document: This document contains an email from the FBI  
15 General Counsel to FBI OGC attorneys, an FBI operational subject matter expert, and an NSD  
16 attorney, conveying his thoughts and mental impressions in response to an email from Twitter's  
17 counsel, including conveying his thoughts and mental impressions regarding a prior conversation  
18 with Twitter's counsel regarding Twitter's communications concerning its proposed  
19 transparency report. That communication was then transmitted to the FBI OGC attorney  
20 assigned the instant matter, in furtherance the defense of the FBI's interests in this litigation.  
21 This document was prepared in confidence, has at all times been maintained in confidence, and it  
22 has not been shared with any third party.

23 ii. Deliberative information contained in the document: This document reflects the FBI's  
24 General Counsel providing information, and his opinions and mental impressions, to other  
25 attorneys representing the FBI with respect to Twitter's communications, as well as to an FBI  
26 subject matter expert, as part of the deliberative process of preparing the FBI's response to  
27 Twitter's request. This document does not represent the FBI's final action or decision, but  
28 instead reflects predecisional discussions among attorneys who were advising the FBI, either as



1 its in-house counsel, or as a legal adviser within DOJ NSD. Release of the document would  
 2 harm the decision-making process by exposing the preliminary discussions shared between  
 3 agency employees, discouraging open, candid communication.

4 ii. Attorney client information contained in the document: This document contains a  
 5 confidential communication from the FBI General Counsel to FBI OGC attorneys, an FBI  
 6 operational subject matter expert, and DOJ attorneys providing them information regarding his  
 7 impressions regarding his communications with Twitter, in furtherance of those attorneys'  
 8 representation of the FBI in connection with the FBI's response to communications from Twitter  
 9 regarding its proposed transparency report, and in anticipation of the instant litigation and  
 10 potential litigation by other individuals or entities seeking to disclose information concerning  
 11 their receipt of national security process. That confidential communication was then transmitted  
 12 to an FBI attorney assigned to the instant matter, in furtherance of that attorney's representation  
 13 of the FBI in the instant litigation. Disclosure of a confidential communication between the FBI  
 14 General Counsel and DOJ and FBI attorneys in furtherance of their representation of their client  
 15 -- in this case, agency -- would impede the FBI's ability to candidly seek legal advice, which is  
 16 necessary to the operational mission of the FBI and the professional mission of FBI attorneys.

17 iii. Work product contained in the document: This document reflects the opinions and  
 18 mental impressions of the FBI General Counsel regarding his communications with Twitter, and  
 19 his reaction to a communication from Twitter, written and provided to other FBI and DOJ  
 20 attorneys in anticipation of the instant litigation, in furtherance of their representation of the  
 21 agency.

22 **Sample 15** (DOJ production)

23 Document Title: "RE: Twitter Transparency Report"

24 Date: August 1, 2014

25 i. General Description of the document: This document contains an email from the FBI  
 26 General Counsel to FBI OGC attorneys, an FBI operational subject matter expert, and NSD  
 27 attorneys, conveying his thoughts and mental impressions in response to an email from Twitter's  
 28 counsel, including conveying his thoughts and mental impressions regarding a prior conversation

1 with Twitter's counsel regarding Twitter's communications concerning its proposed  
2 transparency report. The document also contains subsequent emails transmitting this information  
3 to ODAG and NSD attorneys who were representing and advising the FBI with respect to its  
4 response to Twitter's communications, and reflecting the thoughts and mental impressions of  
5 NSD counsel as to Twitter's public statements regarding its proposed transparency report.<sup>8</sup> This  
6 document was prepared in confidence, has at all times been maintained in confidence, and it has  
7 not been shared with any third party.

8 ii. Deliberative information contained in the document: This document reflects the FBI's  
9 General Counsel providing information, and his opinions and mental impressions, to other FBI  
10 and DOJ attorneys representing the FBI with respect to Twitter's communications concerning its  
11 proposed transparency report and an FBI operational subject matter expert, as part of the  
12 deliberative process of preparing the FBI's response to Twitter's communications. This  
13 document does not represent the FBI's final action or decision, but instead reflects predecisional  
14 discussions among attorneys who were advising the FBI, either as its in-house counsel, or as a  
15 legal adviser within DOJ NSD or ODAG. Release of the document would harm the decision-  
16 making process by exposing the preliminary discussions shared between agency employees,  
17 discouraging open, candid communication.

18 iii. Attorney client information contained in the document: This email exchange contains  
19 confidential communications among the FBI General Counsel and other attorneys at FBI and  
20 NSD, and then ODAG, who would be advising the FBI in connection with communications from  
21 Twitter regarding Twitter's proposed transparency report. The General Counsel's email shares  
22 information in furtherance of those attorneys' provision of advice to the FBI regarding the FBI's  
23 response to communications from Twitter regarding its proposed transparency report, and NSD  
24 counsel's subsequent email likewise shares that attorney's thoughts and mental impressions in  
25 connection with his representation of the FBI concerning its response to Twitter's

26 <sup>8</sup> I understand that this document was withheld in entirety from DOJ's production to  
27 Twitter. I am informed that, pursuant to an agreement between litigation counsel for the parties,  
28 the portion of this document that constitutes a communication from Twitter's counsel was not  
produced, because the same email had already been provided to Twitter in the Government's  
productions.



communications. Disclosure of the confidential communications among FBI and NSD attorneys in furtherance of their representation of their client – in this case, the agency -- would impede the FBI's ability to candidly seek legal advice, which is necessary to the operational mission of the FBI and the professional mission of its attorneys.

iv. Work product contained in the document: This document contains written communications prepared by the FBI General Counsel representing the FBI reflecting his opinions and mental impressions, prepared and developed in anticipation of litigation involving Twitter and other individuals or entities seeking to disclose information concerning their receipt of national security process.

**Sample 16** (DOJ production)

Document Title: "FW: Twitter Transparency Report"

Date: August 1, 2014

i. General Description of the document: This document contains an email from the FBI General Counsel to FBI OGC attorneys, an FBI operational subject matter expert, and NSD attorneys, conveying his thoughts and mental impressions in response to an email from Twitter's counsel, including conveying his thoughts and mental impressions regarding a prior conversation with Twitter's counsel regarding Twitter's communications concerning its proposed transparency report. The document also contains subsequent emails, transmitting this information to additional NSD and ODAG attorneys representing and advising the FBI with respect to its response to Twitter's communications concerning its proposed transparency report.<sup>9</sup> This document was prepared in confidence, has at all times been maintained in confidence, and it has not been shared with any third party.

ii. Deliberative information contained in the document: This document reflects the FBI General Counsel providing information, and his opinions and mental impressions, to other DOJ and FBI attorneys representing the FBI with respect to communications from Twitter regarding

<sup>9</sup> I understand that this document was withheld in entirety from DOJ's production to Twitter. I am informed that, pursuant to an agreement between litigation counsel for the parties, the portion of this document that constitutes a communication from Twitter's counsel was not produced, because the same email had already been provided to Twitter in the Government's production.

1 its proposed transparency report and an FBI operational subject matter expert, as part of the  
2 deliberative process of preparing the FBI's response to Twitter's communications. This  
3 document does not represent the FBI's final action or decision, but instead reflects predecisional  
4 discussions among attorneys who were advising the FBI, either as its in-house counsel, or as  
5 legal advisers within NSD or ODAG. Release of the document would harm the decision-making  
6 process by exposing the preliminary discussions shared between agency employees,  
7 discouraging open, candid communication.

8 iii. Attorney client privileged information contained in the document: This email exchange  
9 contains confidential communications among the FBI General Counsel and other attorneys at  
10 FBI, NSD, and ODAG, who would be advising the FBI regarding the FBI's response to  
11 communications from Twitter concerning its proposed transparency report. The General  
12 Counsel's email shares information in furtherance of those attorneys' provision of advice to the  
13 FBI in connection Twitter's communications concerning its proposed transparency report, and  
14 the NSD attorneys' subsequent emails likewise share the FBI General Counsel's opinions and  
15 mental impressions with other attorneys representing the FBI as to Twitter's communications.  
16 Disclosure of the confidential communications among FBI and NSD attorneys in furtherance of  
17 their representation of their client – in this case, the agency -- would impede the FBI's ability to  
18 candidly seek legal advice, which is necessary to the operational mission of the FBI and the  
19 professional mission of its attorneys.

20 iv. Work product contained in the document: This document contains a written  
21 communication prepared by the FBI General Counsel, reflecting his opinions and mental  
22 impressions, prepared and developed in anticipation of litigation involving Twitter and other  
23 individuals or entities seeking to disclose information concerning their receipt of national  
24 security process.

25 **Sample 17** (DOJ production)

26 Document Title: "Twitter Letter"

27 Date: September 5–10, 2014  
28



i. General Description of the document: This document contains an email from the FBI General Counsel regarding a draft letter from the FBI prepared for possible response to communications from Twitter regarding Twitter's proposed transparency report, offering his legal advice and analysis regarding aspects of the draft and seeking input from other FBI OGC attorneys, an FBI operational subject matter expert, and NSD attorneys, as well as National Security Agency and ODNI attorneys. Additional attorneys from ODAG and ODNI are added to the discussion.<sup>10</sup> This document was prepared in confidence, has at all times been maintained in confidence, and it has not been shared with any third party.

ii. Deliberative information contained in the document: This document reflects the FBI's General Counsel providing legal advice to, and seeking additional legal and operational advice from, other attorneys and an FBI operational subject matter expert representing the FBI with respect to Twitter's communications concerning its proposed transparency report, as part of the deliberative process of preparing the FBI's response to Twitter's communications. This document does not represent the FBI's final action or decision, but instead reflects predecisional discussions among attorneys who were advising the FBI, either as its in-house counsel, or as a legal advisers within NSD, ODAG, or other members of the USIC. Release of the document would harm the decision-making process by exposing the preliminary discussions shared between agency employees, discouraging open, candid communication.

iii. Attorney client information contained in the document: This email exchange contains confidential communications among the FBI General Counsel and other attorneys at FBI, NSD and ODAG, as well as other attorneys in the USIC who would be advising the FBI in connection with its response to communications from Twitter regarding Twitter's proposed transparency report. The General Counsel's email shares information in furtherance of those attorneys' provision of advice to the FBI in connection with determining the FBI's response to Twitter's communications, and the subsequent emails in the chain likewise share the FBI General

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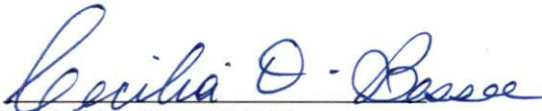
<sup>10</sup> I understand that this document was withheld in entirety from DOJ's production to Twitter. I am informed that, pursuant to an agreement between litigation counsel for the parties, the Government did not produce to Twitter a transmittal email, which was not substantive or the email attachment, which was otherwise provided to Twitter in the Government's productions.

1 Counsel's legal advice and request for further legal advice with other attorneys representing the  
2 FBI as to the same matter. Disclosure of the confidential communications among FBI attorneys  
3 and other attorneys advising the agency in furtherance of their representation of their client – in  
4 this case, the agency -- would impede the FBI's ability to candidly seek legal advice, which is  
5 necessary to the operational mission of the FBI and the professional mission of its attorneys.

6 iv. Work product contained in the document: This document contains written  
7 communications prepared by the FBI General Counsel, reflecting his thoughts and mental  
8 impressions, prepared and developed in anticipation of litigation involving Twitter and other  
9 individuals or entities seeking to disclose information concerning their receipt of national  
10 security process.

11  
12 I declare under penalty of perjury that the foregoing is true and correct.

13 Dated: March 1st, 2019  
14  
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17   
18 CECILIA O. BESSEE  
19 Acting Deputy General Counsel  
20 Federal Bureau of Investigation  
21 Washington, DC  
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# Exhibit B

JOSEPH H. HUNT  
Assistant Attorney General  
DAVID L. ANDERSON  
United States Attorney  
ANTHONY J. COPPOLINO  
Deputy Branch Director  
JULIA A. HEIMAN  
Senior Counsel  
CHRISTOPHER HEALY  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch

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Attorneys for Defendants the Attorney General, *et al.*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

TWITTER, INC.,

Plaintiff,

v.

WILLIAM P. BARR, United States  
Attorney General, *et al.*,

Defendants.

Case No. 14-cv-4480

**DECLARATION OF PATRICK  
N. FINDLAY SUBMITTED IN  
SUPPORT OF DEFENDANTS'  
OPPOSITION TO PLAINTIFF'S  
MOTION CHALLENGING  
DEFENDANTS' PRIVILEGE  
DESIGNATIONS**

Hon. Yvonne Gonzalez Rogers

Pursuant to 28 U.S.C. § 1746, I, Patrick N. Findlay, hereby declare:

1. I am the Acting Chief and Special Counsel of the Office of Strategy Management and Development ("OSMD") of the National Security Division ("NSD") of the United States Department of Justice ("DOJ" or the "Department"). NSD is a component of the Department.

1 See 72 Fed. Reg. 10064 (Mar. 7, 2007). I have served as the Acting Chief of OSMD since July  
2 2018 and as a Special Counsel in OSMD since June 2016. Prior to my positions with NSD, I  
3 served as an Associate General Counsel for the Federal Bureau of Investigation ("FBI") from  
4 July 2012 until June 2016.


5 2. In the course of my responsibilities, I have become aware of the above-captioned  
6 case, and of Twitter's Motion Challenging Defendants' Privilege Designations, ECF No. 258  
7 ("Twitter's Motion"). I have personally reviewed the documents addressed by Twitter's Motion  
8 discussed herein, and I base this declaration on my review, as well as on information made  
9 available to me in my official capacity. I submit this declaration in support of the Defendants'  
10 opposition to Twitter's Motion.

11 3. Sample Documents 4 and 15 are email communications, each described in more  
12 detail below, sent by NSD attorneys during the period in which they provided counsel to the FBI  
13 with respect to Twitter's request to publish Twitter's draft Transparency Report. During the  
14 timeframe in which those emails were written, July and August 2014, NSD attorneys' advice  
15 with respect to Twitter's request was informed by an awareness that Twitter was likely to file  
16 suit in connection with its request.

17 4. Sample Document 4 is an email chain consisting of various replies and forwards  
18 encompassing what appear to be eleven emails. In this declaration, I address only the last two  
19 emails reflected in Sample Document 4, both sent July 12, 2014, which are an email exchange  
20 between two NSD attorneys, both of whom were advising the FBI as to Twitter's request.<sup>1</sup>  
21 These last two emails reflect the senders' mental impressions regarding their communications  
22 with the FBI regarding Twitter's request. The first of these emails includes also an NSD  
23 attorney's advice and opinion regarding a possible FBI response to Twitter's request, including,  
24 expressly, in light of the prospect of litigation. The second email also reflects another NSD  
25 attorney's opinion regarding the FBI's potential response to Twitter's request.

26  
27  
28 <sup>1</sup> The first of these emails also includes as a recipient an ODAG attorney who was also  
advising the FBI as to its response to Twitter's request.



  
PATRICK N. FINDLAY

# Exhibit C

Attorneys for Defendants the Attorney General, *et al.*

<p>TWITTER, INC.,</p> <p>Plaintiff,</p> <p>v.</p> <p>WILLIAM P. BARR, United States Attorney General, <i>et al.</i>,</p> <p>Defendants.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Case No. 14-cv-4480</p> <p><b>DECLARATION OF JULIA A. HEIMAN SUBMITTED IN SUPPORT OF DEFENDANTS’ OPPOSITION TO PLAINTIFF’S MOTION CHALLENGING DEFENDANTS’ PRIVILEGE DESIGNATIONS</b></p> <p>Hon. Yvonne Gonzalez Rogers</p>
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1. I am a Senior Counsel in the Civil Division, Federal Programs Branch, of the United States Department of Justice. I serve as one of the attorneys representing the Defendants





Federal Programs Branch,  
Civil Division  
United States Department of Justice

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